

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400-N  
Washington, DC 20001-8002

(202) 693-7300  
(202) 693-7365 (FAX)



**Issue Date: 26 October 2006**

**BALCA Case No.: 2005-INA-00042**  
**ETA Case No.: P2004-CA-09536164/JB**

*In the Matter of:*

**TRATORIA ACQUA,**  
*Employer,*

*on behalf of*

**FRANCISCO HERNANDEZ-RENDON,**  
*Alien.*

Appearance: Susan M. Jeannette, Agent  
North County Legalization Services  
Del Mar, California  
*For the Employer and the Alien*

Certifying Officer: Martin Rios  
San Francisco, California

Before: **Burke, Chapman, and Vittone**  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** Tratoria Acqua, (the Employer) filed an application for labor certification<sup>1</sup> on behalf of Francisco Hernandez-Rendon (the Alien) on April 12, 2001 (AF 20).<sup>2</sup> The Employer

---

<sup>1</sup> Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”). This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

seeks to employ the Alien as a Cook. *Id.* The issue in this case is whether the Employer's requirement of two years of experience in the job offered is its actual minimum requirement for the job, and specifically, whether it adequately documented that the Alien had such experience prior to being hired by the Employer. This decision is based on the record upon which the Certifying Officer (CO) denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

## **BACKGROUND**

In its application, the Employer described the duties of the Cook position as "Prepare wide range of menu items, according to recipes. Use, operate standard restaurant equipment, utensils, appliances." The Employer required two years of experience in the job offered. (AF 38). The ETA 750B indicates that the Alien was hired by the Employer in May 1999. (AF 64).

In a Notice of Findings (NOF) issued April 23, 2004, the CO observed that the regulations require an employer to document that the job requirements as described represent the employer's actual minimum requirements for the employment. *See* 20 C.F.R. § 656.21(b)(5). Since the Alien appeared to have only four months of experience as a restaurant cook, the CO concluded that the requirement of two years in the job offered did not appear to be the Employer's true minimum requirements. The CO stated that the Employer could delete the minimum requirement and retest the labor market, or retain the requirement and provide convincing justification that it is not now feasible to hire anyone with less than this requirement, or document that the Alien obtained the required experience or training prior to being hired by the Employer. The CO stated that to document the Alien's prior experience, the Employer must provide dates of employment, the name and location of the employer, and the duties performed. (AF 34-36).

The Employer submitted rebuttal on April 28, 2004, asserting that the Alien had the requisite two years of experience. (AF 20-26). In support, the Employer submitted a statement from the Alien and letters from his previous employers. (AF 20). A letter dated March 6, 2001

---

<sup>2</sup> In this decision, AF is an abbreviation for Appeal File.

from the Executive Chef at Roppongi Restaurant stated that the Alien has been employed as a line cook since June 25, 1999 and continuing as of the date of the letter, March 6, 2001. (AF 21). A letter from the General Manager at Taco Bell in National City, California states that the Alien worked as a crew leader for eighteen months from January 17, 1996 and then as a shift manager until February 3, 1999. (AF 22). The Alien provided a statement that he worked from January 1996 to February 1999 for Taco Bell as a crew leader leading the cooking crew. He stated that he worked forty hours per week preparing a wide variety of menu items according to recipes. The Alien stated that he worked for Roppongi Restaurant from June 25, 1999 to March 6, 2001 – also a forty hours per week job in which he prepared a wide range of menu items according to recipes. The Alien stated that from June 1996 until November 2001, he worked two jobs: weekends as a part-time cook for Ladeki's Hotel Parisi, and full-time for Taco Bell. The Alien also stated that he worked part-time for Ladeki's Hotel Parisi while working full-time for Roppongi. (AF 65).

The CO issued a supplemental NOF on May 14, 2004. (AF 31-33). The CO noted that the Alien's statement was confusing because it indicated that the Alien worked three different jobs during the period June 1996 to November 2001, weekends at Ladeki's Hotel Parisi, full-time at Taco Bell, and full-time at Ladeki's Roppongi Restaurant. In addition, the application indicated that the Alien was employed full-time by the Employer from May 1999. (AF 64). The CO noted that any experience the Alien gained after May 1999 cannot be considered qualifying experience for the job described on form ETA 750A. The CO also found that the Alien's experience at Taco Bell cannot be considered qualifying experience because the Alien did not perform the duties of the job being offered. The CO, therefore, required the Employer to provide an amendment to the Form 750B clarifying the Alien's work experience, including providing the work schedule for each employer during the period June 1996 to May 1999.

The Employer submitted rebuttal to the supplemental NOF on May 20, 2004. The Alien stated that he worked forty hours per week for Hotel Parisi as a cook from June 25 1996 until November 20, 2001. The Alien explained that he prepared, seasoned, garnished, and served menu items according to recipes. The Alien stated that during that time he also worked for Taco

Bell, forty hours per week at the same time, preparing, seasoning, garnishing, and serving menu items according to recipes. (AF 27).

The CO issued a Final Determination denying the Employer's application for labor certification on July 23, 2004. (AF 17-19). The CO found that the Alien's statement provided conflicting information. The April 28, 2004 amendment stated that the Alien worked on weekends for Hotel Parisi while working full-time for Taco Bell, while the May 20, 2004 amendment stated that the Alien worked full-time for Hotel Parisi while also holding a full-time job at Taco Bell. The CO concluded that the rebuttals do not show that the Alien had the equivalent of two full years of experience as a restaurant cook when he was hired in May 1999 by the Employer. The CO found that the Employer had not shown that the two-year experience requirement is its actual minimum requirement, and therefore denied the application for labor certification.

In its request for review before the Board of Alien Labor Certification Appeals (Board), the Employer stated that although the Alien's statements were confusing, they did establish two years of experience at Taco Bell from June 1996 through June 1998 as evidenced by both the Alien's statement and the statement from his supervisor at Taco Bell. (AF 4-15). The case was docketed by the Board on December 9, 2004.

## **DISCUSSION**

The regulation at 20 C.F.R. § 656.21(b)(5) is intended to prevent an employer from requiring an employment prerequisite of U.S. workers not required of the Alien. *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989) (en banc). Section 656.21(b)(5) states that "[t]he employer shall document that its requirements for the job opportunity as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer."

Because the Alien's statements about his work experience were confusing and inconsistent, the most credible documentation of the Alien's work experience is the letters from his employers.

The letter from the Executive Chef at Roppongi Restaurant, which indicates that the Alien began work there in June 1999, does not assist the petitioning Employer in establishing the Alien's qualifying experience prior to hire because the Alien was hired by the petitioning Employer in May 1999.

The statement from the National City, California Taco Bell General Manager establishes that the Alien worked there as a crew leader for eighteen months. After that, according to the General Manager, the Alien worked as a shift supervisor. This experience was gained prior the Alien's being hired by the Employer. However, it is not clear that experience as a crew leader or shift supervisor is the equivalent of experience as a cook. The Alien stated that he worked at Taco Bell preparing, seasoning, garnishing and serving menu items according to recipes; however, there is no support for this statement. The CO's question as to whether the preparation of the fast food items served at Taco Bell required the same job skills as experience as a cook in a restaurant, however, was reasonable and cogent. The Employer was requiring, after all, two years of experience as cook – which suggests that it is not merely a fast food restaurant but required an experienced professional cook. The Alien's written assertion that he performed the required job duties during his employment at Taco Bell is documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (en banc); however, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

In this case, the CO offered a supplemental NOF as an opportunity to clarify the Alien's experience for the various employers prior to his employment with the Employer in May 1999, including both the dates and hours worked and the job duty performed in each job. While the Alien's additional weekend and other work for other restaurants may have been sufficient to

show that he had two years of experience as a cook, the statements were too confusing to clearly establish such facts.

The Employer's failure to provide clear documentation in response to the NOF and the supplemental NOF resulted in a failure to establish that the Alien had two years of experience as a restaurant cook prior to being hired by the Employer in May 1999. Therefore, the Employer has not shown that the two-year experience requirement is its actual minimum requirement. Since the Employer failed to document that the Alien had the required experience prior to being hired, we find that the CO properly denied the labor application for labor certification. *See Apartment Management Company/Southern Diversified Properties, Inc.*, 1988-INA-215 (Feb. 2, 1989) (en banc).

### **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.